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Transaction ID 63068448
Case No. 12808-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELIZABETH MORRISON, individually and on behalf of all others similarly situated, Plaintiff, v. RAY BERRY, RICHARD A. ANICETTI, MICHAEL D. CASEY, JEFFREY NAYLOR, RICHARD NOLL, BOB SASSER, ROBERT K. SHEARER, MICHAEL TUCCI, STEVEN TANGER, JANE THOMPSON, BRETT BERRY, SCOTT DUGGAN, CRAVATH, SWAINE & MOORE LLP, JPMORGAN CHASE & CO., J.P. MORGAN SECURITIES, LLC, POMEGRANATE HOLDINGS, INC., APOLLO INVESTMENT FUND VIII, L.P., APOLLO OVERSEAS PARTNERS (DELAWARE 892) VIII, L.P., APOLLO OVERSEAS PARTNERS (DELAWARE) VIII, L.P., APOLLO OVERSEAS PARTNERS VIII, L.P., APOLLO ADVISORS VIII, L.P., APOLLO MANAGEMENT VIII, L.P., AIF VIII MANAGEMENT, LLC, APOLLO MANAGEMENT, L.P., APOLLO MANAGEMENT GP, LLC, APOLLO MANAGEMENT HOLDINGS, L.P., APOLLO MANAGEMENT HOLDINGS GP, LLC, APO CORP., AP PROFESSIONAL HOLDINGS, L.P., and APOLLO GLOBAL MANAGEMENT, LLC, Defendants.	PUBLIC VERSION FILED ON: March 14, 2019 C.A. No. 12808-VCG

VERIFIED AMENDED COMPLAINT

Plaintiff Elizabeth Morrison, by and through her undersigned counsel, on behalf of herself and all other similarly situated former stockholders of The Fresh Market, Inc. ("Fresh Market" or the "Company"), as and for her complaint against the defendants named herein, alleges on personal knowledge as to herself and her own conduct, and on information and belief as to all other matters, including a books and records inspection and document discovery, as follows:

SUMMARY OF THE ACTION

1. This is a case about how sophisticated institutions, wealthy individuals, and pliant fiduciaries triggered, skewed, and corrupted a sale process for a temporarily vulnerable company with tremendous growth prospects. The same fiduciaries and their advisors also defrauded stockholders to obtain approval of the buyout and cover up corrupted aspects of the sale process.

2. Private equity giant Apollo Management, L.P. (together with its affiliates, "Apollo") teamed up with two former Chief Executive Officers of Fresh Market—founder and Chairman of the Board Ray Berry and his son, Brett Berry (collectively, the "Berrys")—with a plan to buy out the Company's public stockholders on the cheap. Apollo and the Berrys used fraud, coercion, and breach

of contract to effectuate that plan. The Company's board of directors avoided threatened stockholder activism by acquiescing to and covering up a sham sale process. The Company's high-powered advisors—J.P. Morgan Securities LLC (together with its affiliates "JP Morgan") and Cravath, Swaine & Moore LLP ("Cravath")—each stood to benefit financially from making a deal happen, and they each aided and abetted breaches of fiduciary duty to do so.

3. The Court of Chancery and the Delaware Supreme Court evaluated the original complaint in this case. The original complaint asserted claims against the Berrys and the former directors of Fresh Market. Its allegations were based on publicly available information and a limited number of documents obtained in a books and records inspection. The Delaware Supreme Court reversed a dismissal that had been based on stockholder approval of the challenged transaction, reasoning that Plaintiff had sufficiently allegedly undisclosed facts about how the auction of Fresh Market was a sham:

> But the trial court rejected Plaintiff's argument because it found "the *facts* regarding Berry's involvement with Apollo were disclosed" and, thus, "[t]he conclusion that the Plaintiff reaches—that the auction was a sham—is not supported by the record." Respectfully, we disagree.

Morrison v. Berry, 191 A.3d 268, 283 (Del. 2018) (footnote omitted).

4. With the benefit of document discovery, Plaintiff has identified additional facets of the sham sale process and additional culpable parties—Apollo, JP Morgan, Cravath, and Company General Counsel Scott Duggan.

5. Fresh Market is a specialty grocery retailer that was founded by Ray Berry in 1982 and controlled by the Berry family until the end of 2012, when the family reduced its stock holdings in a public offering. Ray Berry served as CEO of the Company until 2007. He retained the title of Chairman of the Board thereafter. Brett Berry served as CEO from 2007 to 2009, and as Vice Chairman of the Board from 2009 to 2014. The Berrys owned approximately 9.8% of Fresh Market's outstanding shares in the aggregate prior to the challenged transaction (the "Acquisition"), and approximately 22% of the equity post-closing. Ray Berry's son-in-law, Michael Barry, a former Chief Financial Officer and former Vice Chairman of the Board of the Company, separately owned over 6% of the Company's outstanding stock prior to the Acquisition.

6. In January 2015, when Fresh Market's stock was trading at a price of approximately $40 per share, the Ray Berry-led board of directors fired the Company's CEO. In the summer of 2015, Fresh Market's stock price was languishing near $20 per share as the national search for a new CEO continued.

7. On July 3, 2015, Apollo senior partner Andrew Jhawar proposed to Ray Berry the idea of teaming up to take Fresh Market private. Jhawar had known the Berrys since 2008. More importantly, Jhawar was Chairman of the board of directors of another regional grocery specialty retailer, Sprouts Farmers Market, Inc. ("Sprouts"). Jhawar informed Ray Berry that Apollo had completely sold out of its position in Sprouts two months earlier, thereby cementing a profit of almost $2 billion, or approximately ten times Apollo's investment in 2011. Ray Berry told Jhawar he would discuss with his family the idea of co-investing with Apollo in a take private of Fresh Market.

8. On September 1, 2015, the Board approved the hiring of a new CEO, Richard A. Anicetti, an experienced grocery executive then serving as a strategic adviser to private equity firm Ares Capital. Anicetti was widely considered a leader who could engineer a turnaround.

9. Shortly thereafter, Ray Berry circled back to Apollo and tasked Brett Berry with working on a potential deal. Brett Berry introduced himself to Anicetti and put together a spreadsheet that summarized a theoretical private equity deal from a founder's perspective. Brett Berry shared that spreadsheet with Apollo and Ray Berry. The spreadsheet sent to Apollo contemplated that the Berrys would make a profit ranging from $136 million to $930 million in a private equity acquisition of the Company. The Berrys discussed next steps with Apollo and agreed that they

would roll over their equity in the event that Apollo succeeded in buying the Company.

10. Ray Berry did not comply with the Company's protocol for disclosing potential acquisition proposals. From an email following another director's compliance with the Company's protocol, Ray Berry knew that the Board's lead director, Richard Noll, was of the view that a "normal" acquisition premium would be a non-starter and that a price in the range of approximately $45 to $70 per share would be needed "to even get a real discussion going."

11. On October 1, 2015, Apollo submitted a non-binding, non-public offer to buy Fresh Market for $30 per share. The offer letter stated that "Apollo and the Berrys will be working together in an exclusive partnership as it relates to a transaction with the Fresh Market."

12. Apollo's letter of October 1 presented the Board of Directors with fundamental questions that would repeatedly recur over the next few months. The Berrys and Apollo were a formidable alliance. Should the Board confront Apollo and the Berrys and say "no" to a sale of the Company? Alternatively, should the Board offer to negotiate exclusively with Apollo at a higher price range?

13. The Board chose neither confrontation nor hard bargaining. Instead, at every step, the Board indulged the fiction that the Berrys could be persuaded to work against their own self-interest as prospective buyers with Apollo and might work with other potential private equity bidders. At every step, the Board proceeded along

a choreographed, sham strategic review and sale process in which the Board propagated the fiction that Apollo and the Berrys were not in fact co-bidders with a decisive advantage over other potential suitors.

14. In advance of a board meeting on October 15, 2015, General Counsel Scott Duggan met with Ray Berry and coaxed out of him a set of lies that could have been readily exposed as lies with minimal investigation. All of Ray Berry's lies were designed to contradict Apollo's true statement in its offer letter of October 1 that "Apollo and the Berrys will be working together in an exclusive partnership as it relates to a transaction with The Fresh Market."

15. At the October 15 Board meeting, Ray Berry "confirmed" the accuracy of the false statements he had provided to Duggan. Nobody at the Board meeting probed the accuracy of Ray Berry's statements. In a further choreographed move, Damien Zoubek of Cravath asked Ray Berry if he would be willing to participate in an equity rollover with another party in the event that the Company were to be sold to a party other than Apollo. Rather than say "yes," Ray Berry stated "that he was not aware of any other potential private equity buyer that had experience in the food retail industry with whom he would be comfortable engaging in an equity rollover." The Board was unwilling to take "no" as an answer. The Board resolved to create a Strategic Transaction Committee.

16. The Berrys and Apollo had teamed up at a time of vulnerability for the Company, and they and the Board knew it. After Ray Berry left the October 15,

2015 Board meeting, the Board discussed that (a) the Company's new CEO had not yet developed a strategic plan or long-term forecasts; (b) a significant institutional stockholder, Neuberger Berman LLC, had sent a letter to the Company on October 8, 2015, advocating that the Board pursue a sales process; (c) the Company had received other inbound communications from stockholders and private equity firms and "could be the subject of continued shareholder pressure"; and (d) "Apollo might take action to increase the pressure on the Board, including by potentially making its proposal public."

17. Apollo sent a second letter to the Company on the evening of October 15, 2015, which stated that "Apollo (together with the Berry family rollover) is able and willing to provide 100% of the equity commitment required in this potential transaction."

18. On October 16, 2015, *Reuters* reported that Apollo had agreed to work with Ray Berry and potentially with his son-in-law, Michael Barry, on a potential offer to buy Fresh Market.

19. The Board put the Company in play. On October 20, the Company issued a press release stating that the Board "will conduct a strategic and financial review of the Company's business." That same day, the Company sent a letter to Apollo stating that the Company had "confirmed" with Ray Berry that he had no exclusive arrangement with Apollo.

20. The Board took these steps notwithstanding: (a) the text of Apollo's communications about its partnership with the Berry family; (b) the Berrys' self-interest in suppressing price competition from other potential suitors; (c) Ray Berry's expressed lack of interest in rolling over his equity with anyone other than Apollo; (d) public reporting of the Berry family's working relationship with Apollo; (e) Apollo's bidding advantage, because it could count on a large equity commitment from the Berrys; and (f) the Company's temporarily weakened position with a new CEO who had not yet developed a strategic plan.

21. The Berrys and Apollo continued to pursue their plan. On November 25, 2015, Apollo submitted a letter again proposing to buy the Company for $30 per share. The letter stated that Apollo was making its proposal "together with Ray and Brett Berry."

22. In a conversation that same day, Ray Berry's lawyer promised Fresh Market's outside counsel that he would contact Ray Berry and provide a precise statement about Ray Berry's involvement with Apollo and his view about Apollo's offer. Ray Berry's lawyer provided such a statement by email on November 28. The email stated that:

- in conjunction with Apollo's offer letters, Ray Berry had entered into an oral agreement with Apollo that he would roll over his equity if Apollo entered into a buyout transaction with the Company;
- Ray Berry "believes that Apollo is uniquely qualified to generate value because of its recent success in TFM's space with the acquisition of Sprouts"; and

- if the Company remains public, Ray Berry will "give serious consideration to selling his stock when permitted".

23. The Berrys and Apollo never filed a Schedule 13D with respect to their admitted oral agreements and their proposals to buy out the public stockholders, despite recent SEC prosecutorial activity against violators of §13(d) in connection with going-private transactions.

24. On December 1-2, 2015, the Board decided to commence a sale process. JP Morgan had presented to the Board an illustrative discounted cash flow analysis ("DCF") based on management's November 17, 2015 "Management Case" projections with a range of $34.50 to $44.00 per share.

25. The Board's decision to commence a sale process proceeded on the fictive assumption that Ray Berry was open to rolling over his equity if someone other than Apollo agreed to buy the Company. The sale process design barred potential bidders from contacting potential rollover stockholders.

26. The reality of the situation was that the Berrys were aligned with Apollo, the Board knew it, and the Board did not trust the Berrys not to dissuade potential suitors. Ray Berry had expressed his belief that Apollo was uniquely well situated to buy Fresh Market. He had entered into oral agreements with Apollo. He was incentivized not to create price competition for Apollo. Forbidding suitors from contacting the Berrys worked to Apollo's advantage. Apollo already knew that the Berrys were willing to roll over their equity with Apollo. No other private equity

firm could count on an equity commitment from the Berrys. Published reports gave other potential suitors reason to believe that the Berry family was already working with Apollo. Absent an equity rollover, private equity firms other than Apollo would need to commit more of their own equity into a bid. Committing additional equity had a critical impact on bid economics, especially as debt markets tightened in early 2016.

27. The Berrys and Apollo talked before Apollo signed the confidentiality agreement, and they violated the agreement thereafter. Under the guise of New Year's greetings, the Berrys and Apollo signaled their mutual reaffirmation to a joint bid, which they euphemistically referred to as "a mutually rewarding project" and "to do something together."

28. Apollo's internal documents in advance of submitting a bid affirm an exclusive rollover agreement. On February 25, 2016, Jhawar sent a cover email to Apollo's co-founders and the lead partner for private equity that attached an investment memorandum. The email states: "We are partnered together with (i) the Berry Family (original founders) who would roll $140 million of equity together with Apollo …." Jhawar's talking points for presentation of the investment memorandum state: "Partnered exclusively with the founders … they are rolling $140 million of stock into the deal (10% ownership today that will become 20% [pro forma] for deal) …."

29. Apollo [redacted] for JP Morgan and it was a [redacted] Apollo leveraged that deep client relationship to get an additional significant bidding advantage. JP Morgan's Christian Oberle was its "client executive" for Apollo and acted as an intermediary between JP Morgan's senior M&A adviser and Apollo. In emails on the evening of February 25, 2016, by which time all potential bidders other than Apollo had stopped pursuing Fresh Market, Oberle tipped Jhawar about his impressions from interactions with JP Morgan's head of M&A in North America, Anu Aiyengar:

> I do not sense as if she has conviction around other bidders…surprised she mentioned potential to get you contract in advance of others…
>
> ***
>
> she seems open to fast-tracking you via providing you a contract in advance of others…

(Exhibit A)

30. Jhawar used that information to Apollo's advantage. Jhawar pushed to submit a bid as soon as possible, and he lowered Apollo's bid price. On March 8, Apollo submitted a definitive proposal of $27.25 per share, which was significantly decreased from Apollo's January 25 indication of interest at $31.25 per share. Apollo was the only party to submit a definitive bid.

31. Meanwhile, Cravath and Duggan worked with JP Morgan and certain Company directors to create a path toward acceptance of a bid from Apollo at a price level far below JP Morgan's DCF of the Management Case projections.

32. On February 25, 2016, Duggan convened a meeting of a quorum of the Strategic Transaction Committee, together with himself and outside counsel. Management and JP Morgan were excluded from the key part of the meeting, because it supposedly dealt with "process and legal matters." The context for this meeting of lawyers and two outside directors was the fact that the interest of all potential bidders other than Apollo was waning. The heavily redacted, heavily condensed, and artfully worded minutes for the critical one-hour portion of the committee meeting reflect that the lawyers had devised a plan to accommodate that reality. Without the presence of management, JP Morgan, or one of the three members of the committee, the committee discussed and decided that "additional scenario analyses" should be presented at the next board meeting, when Apollo's expected bid would be considered by the Board.

33. The "additional scenario analyses" were not necessitated by new market information or because management, the Board, or JP Morgan no longer believed in the recently created strategic plan. To the contrary, the Board was expecting that management would develop a "stretch plan," and management was still planning to execute against the previously submitted long run strategic plan.

34. Duggan, Cravath and management planned for the "additional scenario analyses" to be delivered by JP Morgan after Apollo submitted its bid. That way, JP Morgan would have a target to shoot at.

35. On the afternoon and evening of March 8, JP Morgan prepared and asked management to sign off on a series of projection scenarios, which supposedly were "prepared by, or at the direction of, and are approved by the management of TFM." The minutes of the March 8 board meeting falsely state that management "was preparing more fulsome forecast sensitivities for J.P. Morgan to use in its valuation analyses[.]"

36. All too predictably, Apollo submitted the only bid, and the Board approved an agreement at the slightly increased price of $28.50 per share. The Board maintained the charade of permitting chaperoned "introductory conversations" between the Berrys and Apollo and then permitting Apollo to negotiate a rollover agreement with the Berrys.

37. Cravath drafted, and the directors and Duggan approved, a Schedule 14D-9 filed with the Securities and Exchange Commission on March 25, 2016 (the "14D-9"). JP Morgan and Apollo also participated in crafting the 14D-9. The 14D-9 was devoted to the false proposition that the Berrys were open-minded about the outcome of the sale process. The 14D-9 conceals how the Berrys and Apollo worked together throughout the sale process pursuant to an oral rollover agreement, how the outcome of the sale process was foreordained, and how the additional scenario

analyses were created to accommodate a sole bidder that the Board had been unwilling to confront.

38. JP Morgan was paid approximately $15 million. Cravath was paid a premium fee of $5.5 million. [redacted]

(Exhibit B)

THE PARTIES

39. Plaintiff Elizabeth Morrison was, at all relevant times, a stockholder of Fresh Market.

40. Defendant Ray Berry was, at all relevant times, Chairman of the Board of Fresh Market.

41. Defendant Brett Berry is the son of Ray Berry. On March 11, 2016, Brett Berry signed a joinder to the Company's confidentiality agreement providing for jurisdiction in Delaware of any suit arising out "the transactions contemplated hereby."

42. Defendants Richard A. Anicetti, Michael D. Casey, Jeffrey Naylor, Richard Noll, Bob Sasser, Robert K. Shearer, Steven Tanger, Jane Thompson, and Michael Tucci (collectively, the "Director Defendants") were, at all relevant times,

members of the Board. Anicetti was appointed as President, CEO, and a director on September 1, 2015.

43. Defendant Scott Duggan was, at all relevant times, Fresh Market's chief legal officer, with the title of Senior Vice President – General Counsel.

44. Defendant Cravath, Swaine & Moore LLP is a New York limited liability partnership. At all relevant times, Damien Zoubek was a partner of Cravath. Zoubek worked on behalf of Cravath in connection with the Acquisition. Accordingly, the actions and knowledge of Zoubek are attributable to Cravath.

45. Defendant JPMorgan Chase & Co. is a Delaware corporation. JPMorgan Chase & Co. is a publicly traded bank holding company and financial holding company.

46. Defendant J.P. Morgan Securities, LLC is a Delaware limited liability company. It is a wholly owned subsidiary of JPMorgan Chase & Co., and is its principal nonbank subsidiary. J.P. Morgan Securities, LLC was the financial advisor to Fresh Market. Christian Oberle and the JP Morgan M&A advisory team, including Anu Aiyengar, directly or indirectly worked for defendants J.P. Morgan Securities, LLC and JPMorgan Chase & Co. in connection with the Acquisition. Accordingly, the actions and knowledge of Oberle and the M&A advisory team are attributable to defendants J.P. Morgan Securities, LLC and JPMorgan Chase & Co.

47. Defendant Pomegranate Holdings, Inc. is a Delaware corporation controlled by private-equity funds managed by Apollo Management VIII, L.P.

Pomegranate was a party to the Merger Agreement. Pomegranate was the parent of Pomegranate Merger Sub, Inc., which in turn was the offeror in the tender offer for Fresh Market shares and merged with and into Fresh Market in the merger, with Fresh Market surviving as a wholly owned subsidiary of Pomegranate. Pomegranate is named as a filing person in connection with Apollo's Tender Offer Statement on Schedule TO relating to the Acquisition. Pomegranate was formed on March 10, 2016, solely for the purposes of completing the Acquisition.

48. Defendant Apollo Investment Fund VIII, L.P. is a Delaware limited partnership. Investment Fund VIII is a private-equity fund managed by Apollo Management VIII. Investment Fund VIII made an equity contribution of $258,530,619.49 in connection with the Acquisition, and received 47.96% of the equity in the Company post-Acquisition.

49. Defendant Apollo Overseas Partners (Delaware 892) VIII, L.P. is a Delaware limited partnership. Overseas Partners (Delaware 892) is a private-equity fund managed by Apollo Management VIII. Overseas Partners (Delaware 892) made an equity contribution of $161,770,306.32 in connection with the Acquisition, and received 30.01% of the equity in the Company post-Acquisition.

50. Defendant Apollo Overseas Partners (Delaware) VIII, L.P. is a Delaware limited partnership. Overseas Partners (Delaware) is a private-equity fund managed by Apollo Management VIII. Overseas Partners (Delaware) made an

equity contribution of $39,566,612.74 in connection with the Acquisition, and received 7.34% of the equity in the Company post-Acquisition.

51. Defendant Apollo Overseas Partners VIII, L.P. is a Cayman Islands limited partnership. Overseas Partners is a private-equity fund managed by Apollo Management VIII. Overseas Partners made an equity contribution of $79,187,130.95 in connection with the Acquisition, and received 14.69% of the equity in the Company post-Acquisition. Overseas Partners executed an equity commitment letter and a limited guarantee in connection with the Merger Agreement, each of which provided for jurisdiction in Delaware for all actions arising out of or relating to the Merger Agreement.

52. Together, Overseas Partners, Overseas Partners (Delaware), Overseas Partners (Delaware 892) and Investment Fund VIII are referred to in this complaint as the "Apollo Funds."

53. Defendant Apollo Advisors VIII, L.P. is a Delaware limited partnership. Advisors VIII is a general partner of each of the Apollo Funds, and executed the equity commitment letter and the limited guarantee in connection with the Merger Agreement on behalf of each of the Apollo Funds.

54. Defendant Apollo Management VIII, L.P. is a Delaware limited partnership. Management VIII manages each of the Apollo Funds. Management VIII is named as a filing person in connection with Apollo's Tender Offer Statement on Schedule TO relating to the Acquisition.

55. Defendant AIF VIII Management, LLC is a Delaware limited liability company. AIF VIII is the general partner of Management VIII.

56. Defendant Apollo Management, L.P. is a Delaware limited partnership. Apollo Management, L.P. is the sole member and manager of AIF VIII.

57. Defendant Apollo Management GP, LLC is a Delaware limited liability company. Apollo Management GP, LLC is the general partner of Apollo Management, L.P.

58. Defendant Apollo Management Holdings, L.P. is a Delaware limited partnership. Apollo Management Holdings, L.P. is the sole member and manager of Apollo Management GP, LLC.

59. Defendant Apollo Management Holdings GP, LLC is a Delaware limited liability company. Apollo Management Holdings GP, LLC is the general partner of Apollo Management Holdings, L.P.

60. Defendant APO Corp. is a Delaware corporation. APO Corp. is an intermediate holding company, through which Apollo Global holds approximately 49.9% interests in each of the entities that comprise the Apollo operating group, including Apollo Management Holdings, L.P. APO Corp. is a wholly owned subsidiary of Apollo Global.

61. Defendant AP Professional Holdings, L.P. is a Cayman Islands exempted limited partnership. AP Professional Holdings is the entity through which Apollo's managing partners and certain of its other partners indirectly beneficially

own 50.1% interests in each of the entities that comprise the Apollo operating group, including Apollo Management Holdings, L.P.

62. Together, the defendants described in ¶¶ 53-61 above are referred to in this complaint as the "Apollo Management Entities."

63. Defendant Apollo Global Management, LLC is a Delaware limited liability company. Apollo Global is the sole parent of APO Corp. Together, Pomegranate, the Apollo Funds, the Apollo Management Entities, and Apollo Global are referred to in this complaint as "Apollo." At all relevant times, Jhawar was Senior Partner of Apollo and served on Apollo's Investment Committee. Jhawar worked on behalf of Apollo in connection with the Acquisition. Accordingly, the actions and knowledge of Jhawar are attributable to the Apollo defendants.

64. Non-Party Fresh Market is a specialty grocery retailer that offers high quality food products, with an emphasis on fresh, premium perishables and a commitment to customer service. As of March 14, 2016, the Company operated 186 stores in 27 states. Fresh Market is a Delaware corporation headquartered in Greensboro, North Carolina.

THE ACQUISITION

The Berrys Work With Apollo on a Going-Private Proposal Without Ray Berry Informing Fresh Market's Lead Director

65. On Friday, January 9, 2015, the Company's shares traded as high as $40.83 per share, up 21.5% since the beginning of the second half of 2014.

66. On Sunday, January 11, 2015, the Board terminated then-CEO and President, Craig Carlock. The termination was without cause and no details were disclosed about the reason for his termination. Investors were surprised by the sudden firing with no permanent replacement lined up. The stock price took an immediate hit, dropping more than 11% to close at $36.16 on January 13, 2015, the first trading day after the termination was announced.

67. Internally, Ray Berry expressed his view about the market reaction:

> Of course they were surprised, of course Craig was adequate today but we are a growth company with a huge untapped future and need a leader to take us there which was definitely not Craig. I do think it will flop for a short time and then settle into an accurate valuation once the market returns to rational evaluations of TFM.

68. Over the next eight months under interim leadership, the Company was described as "rudderless" as its comparable-store sales suffered and its share price continued to fall markedly, reaching a low of $18.70 in late August 2015.

69. It was in this context that Apollo's Jhawar reached out to Ray Berry and spoke to him for forty minutes on July 3, 2015. Jhawar had kept in touch with

the Berrys since 2008, when Apollo had made a bid for the then-family-controlled Company. Jhawar recounted the July 3 conversation for his colleagues:

> I then pounced and told him I thought it was a very interesting inflection point right now with TFM (given valuation and the apparent lack of love from Wall Street and the analyst community) and asked if he had ever thought about taking the company private. It was clear that he had not thought about this (as he said he was not sure how that would work with him on the board) but he was clearly intrigued….
>
> He asked about Apollo's ownership of Sprouts and my involvement as Chairman at Sprouts. I told him that Apollo had completely sold out of its position (which he was not aware that we had done now) and that I was flexible in terms of timing to come off of the Sprouts Board should there be something to do here with TFM.
>
> Punch line was that he wanted to think more about the conversation and said he would call me back with whether he wants to pursue it after it discussing it with his family….

70. Fresh Market's Board-approved communication protocol provided as follows in the event of an unsolicited acquisition proposal or activist investor communication: "Any director who is contacted should contact CEO, Chairman of the Board and the lead director or, [if] none, Chair of the N&CG Committee."

71. Ray Berry did not contact lead director Richard Noll about any of his communications with Jhawar in the summer of 2015. Ray Berry claims that he reported his conversations with Jhawar near contemporaneously to General Counsel Scott Duggan. No documentation has been produced reflecting the substance of what Ray Berry conveyed to Duggan (or anyone else at the Company) about his

communications with Jhawar. Subsequently, Ray Berry lied about the substance of those communications, as discussed below.

72. On August 12, Jhawar wrote to Ray Berry:

> It would be a lot of fun to work together! Anyway, let me know whenever you have a chance – no real urgency of course, but the debt markets continue to be strong and there could be a nice window of opportunity to try and do something if you are interested.

73. On September 1, 2015, Fresh Market's Board hired Richard Anicetti as the first CEO from outside the Company.

74. Ray Berry spoke to Jhawar on September 4. Ray Berry said he was open to exploring an equity rollover transaction and that Jhawar should contact Brett Berry to discuss structuring. Jhawar and Brett Berry communicated about potential transaction structures.

75. On September 11, Ray Berry wrote to Jhawar: "I have talked to Brett and mentioned some thoughts to Mike [Barry]. Brett is contacting an attorney and one of us will contact you next week after we are certain of our footing."

76. On September 13, Ray Berry received an email from Company lead director Rich Noll about an approach by private equity firm [redacted] to outside director Steve Tanger. Noll noted that Tanger had reported the approach to Noll "as per our protocol" and that Noll was now reporting it to others "as per protocol". Noll added the following thoughts about going-private pricing:

> BTW – Steve and I discussed that given our current valuation (5x EBITDA) a "normal" premium is a non-starter (you can see the stock

> market increasing our valuation quickly now that Rick is in place). My guess is that they'd need to be in the range of 10-15x EBITDA [approximately $45-$70 per share] to even get a real discussion going.

Noll's email evidences his lack of awareness that Ray Berry was simultaneously planning a takeover proposal with Brett Berry and Apollo. Ray Berry wrote nothing to Noll (or anyone else) about his and Brett Berry's communications with Apollo.

77. On September 14, Brett Berry introduced himself by email to Rick Anicetti.

78. On September 16, Ray Berry forwarded to Anicetti and Duggan an email approach from [redacted] Ray Berry never forwarded his August and September emails with Jhawar.

79. On September 24, in anticipation of a call with Apollo the following day, Brett Berry sent both Jhawar and Ray Berry "a spreadsheet (very high level) that summarizes a theoretical private equity deal from a founder's perspective." (Exhibit C) The spreadsheet sent to Apollo contemplated that the Berrys would increase their ownership of the Company from approximately 9.4% pre-deal to

28.3% post-deal and make a profit ranging from 1.85 times to 8.84 times their investment, or approximately $136 million to $930 million:

Buy @	$/Shr	Mkt Cap	Debt	Net MC	Ray	Brett
2/15/2019	$ 26.00	$ 1,263,583,074	$ -	$ 1,263,583,074	$ 51,012,000	$ 68,122,392
30%	$ 33.80	$ 1,642,657,996	$ -	$ 1,642,657,996	$ 66,315,600	$ 88,559,110
35%	$ 35.10	$ 1,705,837,150	$ -	$ 1,705,837,150	$ 68,866,200	$ 91,965,229

Sell @	$/Shr	Mkt Cap	Debt	Net MC	Ray	Brett
	$ 45.00	$ 2,186,970,705	$ (1,137,224,767)	$ 1,049,745,938	$ 127,137,600	$ 169,781,962
	$ 50.00	$ 2,429,967,450	$ (1,137,224,767)	$ 1,292,742,683	$ 156,567,600	$ 209,083,342
	$ 55.00	$ 2,672,964,195	$ (1,137,224,767)	$ 1,535,739,428	$ 185,997,600	$ 248,384,722
	$ 60.00	$ 2,915,960,940	$ (1,137,224,767)	$ 1,778,736,173	$ 215,427,600	$ 287,686,102
	$ 70.00	$ 3,401,954,430	$ (1,137,224,767)	$ 2,264,729,663	$ 274,287,600	$ 366,288,862
	$ 100.00	$ 4,859,934,900	$ (1,137,224,767)	$ 3,722,710,133	$ 450,867,600	$ 602,097,142

ROI (x Return)	$ 45.00	$ 50.00	$ 60.00	$ 70.00	$ 100.00
35%	1.85	2.27	3.13	3.98	6.55
30%	1.92	2.36	3.25	4.14	6.80
None	2.49	3.07	4.22	5.38	8.84

80. Jhawar and the Berrys spoke on September 25, 2015. The Berrys agreed to roll over their equity in the event of a buyout by Apollo. The Berrys and Apollo also agreed that Ray Berry would reach out to Scott Duggan and find out next steps for Apollo presenting its proposal.

81. Ray Berry reached out to Scott Duggan on September 25, 2015 concerning Apollo's acquisition proposal. Jhawar left Duggan a voicemail on September 28 saying [redacted] The board minutes do not reference, and the 14D-9 does not disclose, that Ray Berry initiated the conversations with the Company about Apollo's acquisition proposal.

82. On October 1, Jhawar submitted Apollo's proposal to acquire the Company for $30 per share. One portion of the proposal states:

> **Invitation for Berry Family Rollover**. We have discussed with Ray Berry and Brett Berry the opportunity for them to rollover their equity stake in a transaction with Apollo. We believe that the Berrys can provide significant insight and strategic vision for The Fresh Market on a go-forward basis. Apollo and the Berrys will be working together in an exclusive partnership as it relates to a transaction with The Fresh Market.

83. On October 6, Brett Berry wrote to Ray Berry suggesting he reach out one last time to Mike Barry about participating in the rollover. Brett Berry reasoned: "By asking him for a definitive yes/no, we know that we will have exhausted our duty of inclusion and may well avoid future hurt feelings."

Duggan and the Board Accept Ray Berry's Lies

84. Fresh Market's Board was vulnerable to stockholder activism when Apollo and the Berrys launched their proposal. On August 24, 2015, significant institutional stockholder Neuberger Berman LLC had requested a conference call with Noll. That call was held on September 28, 2015. On October 8, 2015, Neuberger Berman sent Noll a letter setting forth "key takeaways" from the call. Neuberger Berman advocated a "comprehensive strategic review" that would assess, among other things, "a sale of the Company."

85. A special meeting of the Board was called for the morning of October 15, 2015, to consider the Board's response to Apollo's proposal. In advance of the Board meeting, Duggan spoke with Ray Berry regarding any relationship or communications he had with Apollo regarding a potential transaction.

86. In that conversation, Ray Berry repeatedly lied to Duggan, and Duggan did not probe for additional information. According to Board minutes not finalized until February 10, 2016, Ray Berry told Duggan he had three conversations with Apollo about a potential transaction. Those three conversations with Jhawar supposedly consisted of:

(i) a "general discussion about the industry and the Corporation" that was held "a few months back";

(ii) a conversation "a few weeks ago" in which Jhawar "inquired as to Mr. Berry's interest" in an equity rollover, to which Ray Berry responded that "he would consider an equity rollover depending on the terms"; and

(iii) a "courtesy call" right before Apollo submitted its letter on October 1.

87. Ray Berry's chronology was inaccurate and incomplete. Jhawar had inquired on July 3 about Ray Berry's interest in an equity rollover. Jhawar had followed up by email on August 12. Ray Berry had expressed interest to Jhawar on September 4, when he told Jhawar to work with Brett Berry on structuring. On

September 11, Ray Berry confirmed to Jhawar that he had talked to Brett Berry. On September 25, the Berrys told Apollo they would roll over their equity in an Apollo acquisition. They also worked out next steps. Either Ray Berry had not promptly and accurately reported to Duggan about the substance of his communications with Jhawar, or Duggan was complicit with Ray Berry in creating a false record of those communications.

88. Ray Berry fed other lies to Duggan in their pre-Board meeting conversation. Ray Berry falsely represented that [redacted] Ray Berry falsely represented that [redacted]

89. At the Board meeting, Ray Berry falsely "confirmed" the accuracy of Duggan's report of their pre-meeting conversation. Neither Duggan, Cravath, nor any board member cross-examined Berry about any of the above points, or sought additional information, such as Ray Berry's emails with Apollo or information about Brett Berry's communications with Apollo.

90. In a choreographed move, Cravath's Damien Zoubek asked Ray Berry "if he would be willing to participate in an equity rollover with another party were

the Corporation to engage in [a] sale transaction with a party other Apollo." Rather than say "yes", Ray Berry stated "that he was not aware of any other potential private equity buyer that had experience win the food retail industry with whom he would be comfortable engaging in an equity rollover."

91. Following Ray Berry's departure from the Board meeting, the Board decided to tell Apollo that the management team would complete its work developing a strategic plan. The Board "expressed concern that the Corporation could be the subject of continued shareholder pressure, continued shareholder communications and, potentially, more unsolicited acquisition proposals (which may even become public at some point)." The Board also created a "Strategic Transaction Committee" and suggested that the Strategic Transaction Committee retain JP Morgan as its financial advisor.

92. The Board meeting was a choreographed exercise to justify putting the Company in play, alleviating activist pressure. The Board chose not to confront the reality of an Apollo/Berry family alliance.

93. Later on October 15, Duggan alerted JP Morgan to have its head of stockholder activism available on their team. Ackerman and Duggan reviewed activism analyses of top Fresh Market stockholders.

94. On the evening of October 15, Jhawar submitted a follow-up letter to Apollo's prior "proposal (together with Ray and Brett Berry) to acquire" the Company. The October 15 letter contained the following sentence: "Apollo

(together with Berry family rollover) is able and willing to provide 100% of the equity commitment required in this potential transaction."

95. On October 16, *Reuters* reported that Apollo had agreed to work with Ray Berry on a potential offer for Fresh Market and that Michael Barry was considering rolling over his stake. *Bloomberg* also reported that Ray Berry was working with Apollo.

96. On October 18, the Strategic Transaction Committee decided to publicly announce the commencement of a review of strategic and financial alternatives, including a potential sale.

97. On October 19, Jhawar solicited the Berrys' thoughts on a base case model Apollo had put together.

98. On October 20, Noll wrote to Apollo. Noll's letter included the following credulous paragraph:

> We do wish to respond to one specific statement in your letter of October 1, 2015. In that letter, you state that Apollo will be working together with the Berrys on an exclusive basis with respect to a potential transaction. We have confirmed with Ray Berry that he has no such arrangement with Apollo.

99. On October 21, Apollo wrote a letter to Noll advising that "Apollo's proposal (together with Ray and Brett Berry)" was being withdrawn pursuant to its expiration deadline. Apollo had not lost interest in Fresh Market. That same day, Jhawar sent the Berrys an updated financial model with a more aggressive growth case.

The Board Commences a Sale Process That Indulges the False Assumption that the Berrys Are Not Aligned with Apollo

100. On November 25, 2015, Apollo sent JP Morgan a letter addressed to Noll stating that Apollo, "together with Ray and Brett Berry, is sending you this non-binding letter to re-affirm Apollo's highly compelling proposal for a potential acquisition of The Fresh Market." Apollo continued to propose a price of $30 per share.

101. That same day, Cravath spoke to Ray Berry's counsel. Ray Berry's counsel promised to contact Ray Berry and provide Cravath with a precise statement about Ray Berry's involvement with Apollo's offer letter and his view about the offer.

102. On November 28, Ray Berry's counsel sent Cravath an email constituting the promised precise statement. Ray Berry's counsel wrote:

> Since Apollo withdrew its earlier offer in October, Mr. Berry had one conversation with Apollo. During that conversation, he agreed, as he did in October, that, in the event Apollo agreed on a transaction with TFM, he would roll his equity interest over into the surviving entity. Apollo determined the price that was offered. Mr. Berry's agreement with Apollo is oral. They have no written agreement.
>
> More generally, Mr. Berry believes it is in the best interests of the shareholders for the board to pursue a sale of the company at this time due to the low valuation of the company in spite of a built-in premium as well as the complexity of implementing the changes Rick Anicetti covered in the earnings release while under the scrutiny of the public market.

> Should Apollo not be successful in its bid, Mr. Berry would consider rolling his equity interest over in connection with an acquisition of TFM by another buy-out firm that successfully bids for the company, provided he has confidence in its ability to properly oversee the company. As he mentioned to the board of directors in October, however, he believes that Apollo is uniquely qualified to generate value because of its recent success in TFM's pace with the acquisition of Sprouts. If The Fresh Market remains public, Mr. Berry will give serious consideration to selling his stock when permitted as he does not believe TFM is well positioned to prosper as a public company and he can do better with his investment dollars elsewhere.

(Exhibit D)

103. In other words, Ray Berry wanted to see the Company sold to Apollo. He had agreed to roll over his equity in a sale to Apollo. He thought Apollo was a "uniquely qualified" buyer. To bring about a sale to Apollo, Ray Berry was warning or threatening that he could trigger a massive decline in the stock price of Fresh Market in the absence of a Company sale. He would give "serious consideration" to selling his block, presumably in conjunction with his family members. An insider-driven stock collapse following the Board's refusal to sell the Company for a premium would doom the tenure of the incumbent directors. They would face massive activist pressure.

104. The Board got the message. On December 1 and 2, 2015, the Board met. Noll reported that [redacted] The Board discussed Ray Berry's counsel's email of November 28, and the fact that [redacted]

[redacted] Duggan read the November 28 e-mail in its entirety to the Board. The Board [redacted] The Board considered the preliminary value of $30 per share received from Apollo to be [redacted] in light of the information reviewed by the Board at the meeting. The Board granted the Special Transaction Committee expanded authority to run a sale process and instructed the committee to work with its advisors to design a sale process.

105. The Board did not discuss on December 1-2 the fact that it had been lied to by Ray Berry on October 15. After repeatedly denying at the October 15 board meeting that he had any agreement with Apollo, Ray Berry had now admitted, through his counsel's email of November 28, that Ray Berry and Apollo had been operating in October pursuant to an oral agreement whereby Ray Berry would rollover his equity if Apollo acquired the Company.

106. The Board commenced a sale process even though the Board and its advisors attributed significant value to the Company and its strategic plan. In late October and through November 2015, the management team had worked with McKinsey to develop the Company's strategic plan and forecast, and the Strategic Transaction Committee met with members of management and McKinsey, among others, to discuss that plan and forecast. On December 1, the Board praised the strategic plan and forecast as "comprehensive and thoughtful." On December 1, the

Board received a preliminary financial analysis from JP Morgan. J.P. Morgan's illustrative discounted cash flow analysis based on the management projections provided a range of values from $34.50 to $44.00 per share.

107. The Strategic Transaction Committee's sale process design was predicated on (a) the supposed willingness of the Berrys to be open-minded and (b) the supposed willingness of potential suitors to count on the Berrys' open-mindedness. On December 3, 2015, Cravath contacted Ray Berry's counsel to "confirm" the following:

(i) Ray Berry continued to be willing to discuss an equity rollover with any potentially interested party that the Board selected as a winning bidder; and

(ii) Ray Berry would agree not to engage in any discussions regarding an equity rollover with any potentially interested party, including Apollo, until authorized to do so by Fresh Market.

Cravath told Ray Berry's counsel that it would be important to the integrity of any sale process that JP Morgan be able to confirm to all potentially interested parties this framework. Supposedly, each potentially interested party would be aware that Ray Berry was not working exclusively with any one bidder and that he would be available to discuss an equity rollover with any winning bidder. No participants in the sale process would be permitted to speak with Ray Berry regarding these matters

until authorized by Fresh Market. Ray Berry's counsel stated that Ray Berry agreed to abide by this process.

108. These conditions for a sale process with integrity were a fantasy. Ray Berry had entered into an oral agreement with Apollo and lied about it to the Board. Ray Berry had told the Board that Apollo was "uniquely qualified" to buy the Company. Apollo had repeatedly communicated to the Company that Apollo was working with the Berrys. The Berrys and Apollo had been working together for months. As prospective buyers of Company stock, the Berrys had a powerful economic interest not to create price competition for Apollo. It had been publicly reported that Ray Berry was working with Apollo. Absent open communication between prospective suitors and the Berrys, prospective suitors could not have any confidence in the Berrys' willingness to work with them. Cravath and JP Morgan were asking the Board and potential suitors to bank on the mere possibility that the Berrys might work with a private equity buyer that was willing to outbid Apollo.

109. A learned commentator on the M&A process has written that a fiduciary in Ray Berry's position has "limited credibility" when representing a willingness to work with potential competing bidders:

> If the CEO is a net buyer in the transaction, the CEO will have personal financial incentives to discourage overbids, which push the price up. A well-advised CEO would of course make representations of being willing to work with third-party bidders, in order to maximize the price paid to exiting shareholders, but these representations will have limited credibility in this scenario.

Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 591, 625 (2016). Ray Berry had already revealed his lack of credibility to the Board. The Board indulged a false assumption to justify a sale process the Board had been pressured to commence.

110. As sophisticated advisors, JP Morgan and Cravath recognized that the sale process they devised for the Board was premised on the false assumptions of Ray Berry's open-mindedness and credibility. JP Morgan and Cravath each had powerful economic incentives to set up a sham auction process.

111. JP Morgan's compensation for its financial advisory role was wholly contingent on the transaction process reaching the end stage at which the board of directors requested a fairness opinion. The Company agreed to pay JP Morgan $2 million upon delivery of a fairness opinion and an additional sum of approximately $13 million upon closing of a transaction. Additionally, as discussed below, Apollo was a major client of JP Morgan.

112. Cravath also stood to make millions of dollars for a premium fee, contingent upon the closing of a sale transaction. The closing of a sale transaction to Apollo would accomplish the objective of Cravath's director and officer clients—extracting them from a difficult situation without raising the ire of stockholder activists—and it would serve the interests of powerful repeat players, JP Morgan and Apollo. Cravath's task was to lend a patina of integrity to a sham auction.

Apollo and the Berrys Breach the Confidentiality Agreement

113. On December 3, the day after the Board decided to commence a sale process, Jhawar set up an update call with the Berrys. That same day, Ray Berry forwarded to Jhawar the final draft of the November 28 email from Ray Berry's counsel to Cravath. Also that same day, Apollo received a draft confidentiality agreement from the Company.

114. The confidentiality agreement provided that "the prior written consent of the Company" would be needed for Apollo to have any discussions with anyone about an equity rollover or joint bid. The confidentiality agreement further provided that "express permission of the Company" would be needed for Apollo to "initiate or maintain contact with" a director of the Company.

115. Apollo signed the confidentiality agreement on December 9. Jhawar's call list for the same day lists both of the Berrys as well as another planned co-investor in Apollo's bid for Fresh Market.

116. At a December 22, 2015 Strategic Transaction Committee meeting, Anicetti reported that Ray Berry had told him that the Board should have immediately engaged in discussions with Apollo and that Ray Berry had complained about the length of time the Board's process would take.

117. On January 5, under the guise of a New Year's greeting, Jhawar wrote to the Berrys to make sure that the planned equity rollover with Apollo was still in

place. Jhawar wrote: "Hopefully, 2016 will be an exciting year for all of us to do something together." Ray Berry responded on January 8 in a manner that confirmed the Berrys' prior agreement to rollover their equity with Apollo: "We are anticipating the possibility of an exciting 2016 with us participating together on a mutually rewarding project."

118. On January 12, 2016, JP Morgan sent potential suitors a process letter establishing January 25, 2016 as the deadline to submit indications of interest. The process letter advised that Ray Berry had informed Fresh Market that he would be open to discussing a potential rollover of his shares at a later date, when authorized by Fresh Market.

119. On January 13, 2016, Jhawar's assistant emailed him to call Brett Berry. On information and belief, Jhawar and Brett Berry spoke on or about January 13 concerning the bid process and their combined bid to acquire the Company.

120. At a January 21, 2016 meeting of the Strategic Transaction Committee, Duggan reported that [redacted] In fact, as noted above, Ray Berry had spoken to and exchanged emails with Jhawar, and Ray Berry had expressed criticism of the Board's process to Anicetti.

Apollo Works with JP Morgan To Skew the Sale Process In Its Favor

121. Apollo is a major client of JP Morgan. In the two years preceding March 2016, JP Morgan received aggregate fees of $116,780,392 from Apollo and

its affiliates for a variety of services (*e.g.*, financial advisory, bank financing, and debt and equity underwriting services to portfolio companies of Apollo), including acting as joint bookrunner on Apollo's offering of debt securities in May 2014.

122. In late December 2015, in the midst of the Company's sale process, Apollo brought a potential debt financing opportunity to the attention of Christian A. Oberle at JP Morgan. That opportunity was financing Apollo's potential acquisition of AmQuip Crane Rental and Maxim Crane Works. That transaction was publicly announced on May 2, 2016, with JP Morgan as a lender to Apollo.

123. Meanwhile, on January 25, 2016, Apollo was one of several parties that submitted indications of interest to buy Fresh Market. Apollo's indication of interest was at $31.25 per share.

124. Apollo continued to pursue Fresh Market aggressively and sought information about timetables and tactics. Jhawar looked to Oberle for assistance in the Fresh Market sale process. Oberle was not part of the M&A team for JP Morgan, but he was more than happy to oblige a major financial sponsor client.

125. In early 2016, volatility in the debt markets was sidelining many leveraged buyouts. Apollo, however, agreed to acquire ADT Corporation in a mega-transaction announced on February 16.

126. On February 19, Jhawar asked Oberle for information. Oberle told Jhawar that JP Morgan's most senior M&A advisor, Anu Aiyengar, favorably

compared Apollo to other "fading" private equity firms, in the context of the Fresh Market sale process:

> Sounds as if they're targeting second week of March but will have confirmation Tuesday when our guys are back in front of the board.
>
> Obviously I'm making the case that you can be done within 2 weeks with a financing commitment - Anu doesn't doubt it. For what it's worth, [redacted] ***and applied it to this process as evidence*** [redacted]….

(Exhibit A)

127. On the afternoon of February 25, 2016, JP Morgan presented to the Special Transaction Committee about how Apollo "continued to work very fast, appeared to be motivated to move quickly and had indicated to JP Morgan that they would prefer a bid date earlier than March 14th." JP Morgan further presented about how the other suitors, by contrast, were all fading away. According to the minutes: "[redacted] interest was waning…. [redacted] interest was also waning…. [redacted] had decided that they would not proceed …. [redacted] was concerned about its bandwidth …."

128. On the evening of February 25, 2016, Oberle provided additional intelligence to Jhawar about how JP Morgan's head of M&A lacked conviction about the other potential suitors:

> [Anu Aiyengar] should be calling you momentarily

> Wants to get you a contract tomorrow and ask for mark-up – wants mark-up to reflect your interest and willingness to be constructive (i.e., light mark-up – big surprise)
>
> Wondering whether you're really 'ready to be done near-term' on the financing given her impression that you're still asking to get certain/new financing sources involved
>
> She is very complementary of your approach and touch during this process – will encourage you to continue to 'play it cool' throughout this last stage
>
> ***I do not sense as if she has conviction around other bidders***…surprised she mentioned potential to get you contract in advance of others…

(Exhibit A) (emphasis added)

129. This information was critical to Jhawar. The following morning, Jhawar wrote to Apollo's counsel: "I will call you later today to also update you on [Fresh Market] – don't call JPM anymore as I know how this will work".

130. On the evening of Saturday, March 5, Jhawar wrote to Apollo's counsel: "Let's have a call right now as the JJPM banker just called back with a preferred path."

131. On March 8, Apollo submitted a definitive proposal of $27.25 per share, which was significantly below its January 25 indication of interest at $31.25 per share. Only Apollo submitted a definitive bid.

132. On March 12, the day after the Company's Board approved a merger agreement with Apollo, Jhawar wrote an email to Oberle entitled "Thank you!!" The

text of Jhawar's email stated: "Thank you very much for all your help and advice throughout – all very helpful and much appreciated. It will not be forgotten!"

133. Oberle responded to Jhawar on March 13:

> The right outcome, and I'm very genuinely happy for you Andy. I very much appreciated your note and wish I could have done more to try and be helpful, especially in the later stages.

JP Morgan Creates Downward Sensitivities to Accommodate Apollo's Bid

134. Until almost the end of the sale process, management and the Board were committed to the Management Case numbers presented to the Board on December 1, 2015. Sensitivities were created and adjusted after Apollo's submitted its bid. The purpose of the sensitivities was to make Apollo's bid look fair.

135. On December 11, 2015, CFO Jeff Ackerman delivered to JP Morgan a document attesting to the integrity of the three-year financial model built from the long-term strategic plan:

> We have pressure tested the matters discussed at the December Board meeting and have confirmed that there are no changes to the financial model that need to be made and, accordingly, you should disregard the downward revised projections provided to you on November 18. Management stands behind the three year financial model that was presented to the Board on December 1-2, and you should continue to utilize that financial model.

136. On February 2, 2016, the Board approved management's 2016 operating plan, which tracked the Management Case projections from November 17, 2015. On February 16, finance executive Raj Vennam confirmed to JP Morgan that

management and the Board "have reviewed and signed off" on the fiscal year 2016 annual operating plan.

137. On February 10, Duggan reported to Ray Berry that [redacted] On February 21, Anicetti wrote to the Board: [redacted]

138. Duggan squashed discussion of stretch targets. Duggan emailed Anicetti: [redacted] Duggan told Jeff Naylor, Chair of the Strategic Transaction Committee, that he [redacted]

139. Duggan and Cravath's plan was to create downwardly adjusted sensitivities to support an expected bid from Apollo. This was a lawyer-driven exercise. On February 20, Duggan wrote to Anicetti and Ackerman that [redacted] Duggan wrote: [redacted] On February 25, Duggan emailed that the Strategic Transaction Committee would be [redacted]

[redacted]

140. The choreographed Strategic Transaction Committee of February 25 was a key juncture in the sale process. JP Morgan gave an oral report at the outset of the meeting about the status of the potential bidders. As noted above, Apollo was moving forward aggressively while others were "waning". The meeting continued for an hour after JP Morgan left the meeting. The minutes for this one-hour portion of the meeting are only one paragraph long. According to the minutes, [redacted]

141. One stated rationale [redacted] (*Id.* at 4) Yet, plenty of recurring positive bidder feedback had been gathered by JP Morgan, such as:

- Compelling opportunities for future growth
- Positive sector tailwinds
- Opportunity to increase store growth
- Tremendous upside potential with the operational turnaround plan

Risk associated with the turnaround plan was one stated reason for potential bidders to decline to proceed in the process, but other stated reasons had nothing to do with management projections, such as:

- Hesitant to participate in auction without a unique “angle”
- Potential financing concerns
- Lack of experience / history in food retail

142. In an update email on February 26 to the absent member of the Strategic Transaction Committee, Richard Noll, as well as CEO Anicetti and CFO Ackerman, Duggan did not mention the decision to create additional projection scenarios.

143. On March 1, Duggan sent Noll, Anicetti, and Ackerman a list of proposed topics for the upcoming March Board meeting. The proposed topics said nothing about any sensitivity analyses.

144. On March 1, Ackerman advised JP Morgan that there was no updated long run strategic plan and that “we still plan to execute against the previously submitted” long run strategic plan.

145. On March 2, Duggan sent Strategic Transaction Committee members Naylor and Shearer (but not Noll) a Cravath-drafted outline for a future Board meeting at which Apollo’s expected bid would be considered. The outline called for [redacted]

146. On March 2, management and JP Morgan held a conference call on the subject “Sensitivity discussion”.

147. The Special Transaction Committee (without Noll) met on March 3. JP Morgan attended the meeting. They discussed what materials should be prepared for the Board to assist in an evaluation of Apollo’s expected bid. “The Committee reiterated its prior request that management and JP Morgan to refine those sensitivities [that had been prepared by JP Morgan for the December 1 Board meeting] and develop additional financial projection scenarios so that the Board would have that perspective when it met to determine how to respond to any bids that were received.”

148. In a lengthy conversion on March 4, Special Transaction Committee member Shearer “made it very clear” to Anicetti that the Board “will be looking to management to seriously weigh in on the ‘merit of things’.”

149. Subsequent to that conversation, senior management discussed presenting a visual model depicting the sales and EBITDA impact of the current three-year operating plan being achieved either six months earlier than planned, or not achieved until six, nine, or twelve months later than expected. Anicetti also prepared a draft of qualitative risks to the plan.

150. On March 6, Duggan advised the Strategic Transaction Committee about the status of Apollo’s expected bid and the status of planning for upcoming

meetings of the Strategic Transaction Committee and the Board. Committee member Naylor asked:

[redacted]

Duggan replied:

[redacted]

151. On March 7, Ackerman commented on a draft of management's visual presentation about the EBITDA impact of the timing of the achievement of the operational plan. Ackerman wrote:

[redacted]

152. Also on March 7, the JP Morgan team created unit growth, gross margin and revenue sensitivities. After an internal meeting with JP Morgan's lead banker, JP Morgan slashed its gross margin and revenue sensitivities.

153. On March 8, the same day that Apollo submitted a formal bid of $27.25 per share, JP Morgan provided Fresh Market management with draft unit growth, gross margin and revenue sensitivity cases. The unit growth case was an upside case that contemplated opening more new stores than the Management Case.

154. On the afternoon of March 8, JP Morgan sent Fresh Market management its revised sensitivities. The new sensitivities excluded the upside unit growth case. JP Morgan sought confirmation that the gross margin and revenue

"sensitivities to the company projections are prepared by, or at the direction of, and are approved by the management of TFM." Company executive Vennam confirmed 25 minutes later.

155. On the evening of March 8, following a meeting of the Special Transaction Committee, JP Morgan sought confirmation for "**three**" attached projection scenarios"—a "Gross margin scenario"; a "Comparable growth scenario"; and a "Comparable growth and gross margin scenario". Duggan forwarded the sensitivities to Cravath, reporting:

> [redacted]

156. After running a discounted cash flow analysis showing the new third scenario generated implausibly low values, JP Morgan moderated the third case and sent another request to management for confirmation of the three projection scenarios. On the evening of March 8, management confirmed JP Morgan's updated three projection scenarios within an hour of receipt.

157. The minutes for the May 8 meeting of the Special Transaction Committee say nothing about JP Morgan creating cascading downside sensitivity scenarios. Instead, the minutes falsely state that management was creating forecast sensitivities:

> Management confirmed that it was preparing more fulsome forecast sensitivities for J.P. Morgan to use in its valuation analyses.

Similarly, the 14D-9 falsely states that "TFM's management prepared the Additional Scenario Information."

158. The following chart displays the valuation implications of JP Morgan's scenario changes on March 7 and 8:

	March 7	March 8 Morning	March 8 Evening (version 1)	March 8 Evening (final version)
Management Case	$33.97 - $42.54	$33.99 - $42.56	$33.72 - $42.18	$33.72 - $42.18
Unit Growth	$27.24 - $33.57	$34.39 - $43.17	Removed	Removed
Comparable Growth	$32.11 - $40.12	$26.52 - $32.98	$26.34 - $32.73	$26.34 - $32.73
Gross Margin	$28.46 - $35.67	$25.72 - $32.24	$25.56 - $32.00	$25.56 - $32.00
Comparable Growth & Gross Margin	None	None	$18.12 - $22.50	$20.89 - $25.91

Other Aspects of the Sale Process

159. On February 2, 2016, the Board (except Ray Berry) met and discussed, among other things, the sales process. JP Morgan discussed with the Board the fact that "the leveraged finance markets were in an extremely challenging state, with volatility, difficult pricing and lack of receptivity in the market to new issuances other than from the most highly rated credits." Apollo's knowledge that the Berrys were committed to rolling their equity into a transaction with them made any worries about obtaining debt financing significantly less important to Apollo than to the other parties.

160. The Strategic Transaction Committee determined on February 18, 2016 that rollover discussions should be permitted only after final bids had been received, after the Board had determined that it would proceed with a potential sales transaction and after the Board had agreed on price and other material transaction terms with the winning bidder.

161. The Strategic Transaction Committee communicated to the parties in the process that they should plan to submit offers by March 14, 2016. Apollo wanted to accelerate the process. The Strategic Transaction Committee obliged, engaging with Apollo on the terms of a proposed merger agreement long before any other party was given that option and allowing it to submit a bid earlier than the March 14, 2016 date communicated to other bidders.

162. When, on March 8, 2016, Apollo submitted its offer, it was clear that Apollo had become even more emboldened. It dramatically lowered the price it was offering, submitting a definitive proposal to acquire Fresh Market in an all-cash transaction for the price of $27.25 per share (down from its January 25, 2016 offer of $31.25 per share) of Fresh Market common stock. Although Apollo offered explanations for the reduction in the offered price, including its perception that the Company needed a more significant turnaround than previously expected and that conditions in the market meant obtaining debt financing would be more difficult than previously expected, it also seems that Apollo was confident in its position as the leading contender to acquire the Company and was not feeling competitive pressure,

particularly given Oberle's tip that JP Morgan's lead M&A banker lacked conviction about other potential bidders. Indeed, given Apollo's knowledge that it had the inside lane with respect to rollover equity, Apollo knew that the tightness in debt markets strengthened its negotiating position because debt financing would be a greater obstacle to other potential acquirors than it was to Apollo. That is, other potential acquirors would have to obtain more financing than Apollo in order to pursue a transaction at the same price because Apollo knew it would need to borrow enough money only to pay for about 90% of the equity, whereas other potential acquirors had to assume they would need financing to pay for all 100%.

163. Apollo's March 8, 2016 proposal stated that it was not contingent on an equity rollover by Ray Berry or any other member of the Berry family, but Apollo had indicated to J.P. Morgan that its preference was to start (or, more accurately, continue) discussing an equity rollover before announcement of a transaction. Given the discussions and understandings outlined above, however, it is clear that Apollo did not expressly condition its offer on any equity rollover for at least three reasons. First, Apollo was (and/or its lawyers were) trying to help the Director Defendants create a misperception that all potential acquirors were on a level playing field by pretending there was no preexisting understanding regarding rollover equity. Second, Apollo already knew that Ray Berry and Brett Berry would roll their equity over based on that preexisting understanding, so it did not need to condition its offer on their doing so. And third, given the preexisting understanding, Apollo knew that

further discussions about the rollover would be focused on specific rollover agreement terms, not on whether Ray Berry or Brett Berry would roll over at all; as a result, they saw little need to have lengthy discussions with them about the rollover agreements as long as they could discuss them briefly to confirm the major terms before announcing a transaction.

164. Also on March 8, 2016, the Strategic Transaction Committee determined that a price of $27.25 was not sufficient to move forward with Apollo and that it would only consider allowing Apollo to engage in discussions with Ray Berry and other members of the Berry family regarding a potential equity rollover if Apollo sufficiently improved its offer.

165. On March 9, 2016 – still before the deadline for bids from other parties – Apollo submitted its "best and final" offer to acquire Fresh Market in an all-cash transaction for $28.50 per share of Fresh Market common stock. On the same day, Apollo reiterated its interest in speaking with members of the Berry family regarding a potential equity rollover. Later that morning, the Strategic Transaction Committee determined, based on Apollo's revised offer price, that Apollo would be allowed to engage in discussions with Ray Berry and other members of the Berry family regarding a potential equity rollover. The Strategic Transaction Committee directed that these discussions would be chaperoned by J.P. Morgan and that no specific price details would be shared. In advance of the chaperoned discussions, Ray Berry emailed Brett Berry and Jhawar:

> It is exciting that TFM has decided to proceed with Apollo. … I am looking forward to working with you both to help TFM develop into a viable high growth and profitable retailer.
>
> Thanks for all the work you and the Apollo people did over the past several months Andy.

166. The Strategic Transaction Committee met on March 10, 2016 to discuss Apollo's "best and final" offer. Anicetti and Ackerman argued for downward departures from management's plan and projections. Anicetti and Ackerman falsely described the projections as "an optimistic scenario if every element of the plan went according to estimates from both an execution and timetable standpoint." This directly contradicted the facts they had reported at the time the projections were developed, that they in fact incorporated a "15% overall risk adjustment, with different initiatives receiving different risk weighting based on likelihood of achievability."

167. Based on this false depiction of the projections as blithely assuming all would go well and the fact that, while comparable store sales so far had been in line with the plan, new store sales had underperformed slightly relative to the plan, Anicetti and Ackerman convinced the Strategic Transaction Committee that those projections were in fact an "optimistic" case that required further downward adjustments.

168. That done, J.P. Morgan presented its valuation analyses based on the November 17 Management Case, as well as on three increasingly dire downside

scenarios, contemplating: (a) that the Company's sales would underperform significantly; (b) that margin would be significantly worse than anticipated; and (c) that both sales and margin would be significantly worse than anticipated (even though a primary philosophy reflected in the strategic plan was to sacrifice some margin in order to boost sales through reduced prices).

169. Beyond using lowered projections, J.P. Morgan also made a significant change to its analysis, [redacted] to a range of 9.0%-10.0%. Asked about this change, J.P. Morgan misled the Board. In particular, J.P. Morgan stated that [redacted] In reality, however, the beta used in the later presentation was only [redacted] The more significant change was made to the equity risk premium, which changed markedly from [redacted] for no good reason.

170. Even using the new, less-favorable discount rate, J.P. Morgan's discounted cash flow analysis based on the original management projections still implied a value of $33.75 to $42.25 per share, well above the deal price.

171. Later, on March 10, 2016, the Board's counsel received a draft of a rollover, contribution and exchange agreement and a draft support agreement from Apollo's counsel in connection with the Berry family's potential rollover of their

Fresh Market shares in the transaction. The Board's counsel relayed the drafts to the Berrys' counsel.

172. At a meeting held on March 11, 2016, the Board agreed to sell the Company to Apollo for the meager and dramatically lowered price of $28.50 per Fresh Market share (down almost 9% from Apollo's January 25, 2016 offer of $31.25 per share). That price was well below the range of values indicated by J.P. Morgan's discounted cash flow analysis, based on the management projections, which was $33.75 per share to $42.25 per share (even using J.P. Morgan's new, higher discount rate). Again, J.P. Morgan justified the lower price by using the three sets of downside scenarios for its analysis. And again, defendant Anicetti told the Board that the three downside scenarios were necessary to "provide dimension" to the "risks embedded in the Corporation's strategic plan," without mentioning the fact that the initial projections already incorporated a 15% risk discount. Supporting this assertion, Ackerman told the Board that the outlook for the first quarter was that the Company would miss management's forecast – by just $0.01 of adjusted EPS.

173. Also at the March 11, 2016 meeting, the Board granted Apollo permission to engage in negotiations with Ray Berry and Brett Berry regarding the rollover of their existing shares of Fresh Market common stock. Any negotiation of rollover agreements did not take long. Apollo and the rollover stockholders entered into a rollover, contribution and exchange agreement and a support agreement the next day.

Market Reaction

174. On March 14, 2016, Fresh Market and Apollo announced that Fresh Market would be acquired through a tender offer for $28.50 per share, or $1.36 billion in the aggregate, in which Ray Berry and Brett Berry agreed not to tender their combined 9.8% stake and instead both participate and rollover the vast majority of their holdings.

175. On the same day, *Bloomberg* published an article entitled "Apollo's Edge in the Fresh Market Auction," which stated:

> Strategic buyers like Kroger can justify paying more because they're better able to extract cost savings, so it's unusual for them to be outmaneuvered by buyout shops. In this case, the latter had an edge.
>
> * * *
>
> *Bloomberg News* reported in October that Fresh Market's founder and board chairman Ray Berry was considering taking the company private and had turned to Apollo for help. While a deal with Kroger could have included Kroger's own shares as a form of payment, Fresh Market would account for less than 4 percent of the larger company's earnings. That means even if the acquisition paid off, there's a chance it might not have done much for Kroger's stock price.
>
> Berry and his son own roughly 9.8 percent of Fresh Market and likely had a preference for a deal that would let them maintain an equity stake in order to directly benefit if the company flourished under a new owner's control. The chance to invest alongside Apollo, which made more than 10 times its investment in Sprouts Farmers Markets and 2.8 times its investment in Smart & Final, surely would have appealed.
>
> ***For Apollo, the Berry family's interest in rolling its stake (valued at about $133 million) helped plug a financing gap at a time that has been tricky for buyouts, and resulted in a transaction involving less debt. That may have made banks more willing to***

commit, since less leverage is a feature favored by the eventual holders of the notes backing the buyout.

Board and Management Conflicts

176. The Acquisition is the product of a flawed process that was designed to ensure the sale of Fresh Market to Apollo on terms preferential to defendants and other Fresh Market insiders and to subvert the interests of plaintiff and the other public stockholders of the Company. The Acquisition was driven by the Berrys, whom the Board allowed to enter into rollover and support agreements with Apollo.

177. The Board and Company management received over $31 million from the sale of their illiquid holdings and from special payments – not made to ordinary stockholders – for unvested stock options, performance units and restricted shares, all of which, upon completion of the transaction, became fully vested and exercisable, and, for the Company's senior management, change-of-control payments. Anicetti became entitled to over $9 million in change-of-control benefits (nearly $6 million of which were "single-trigger" payments that do not depend on his termination) for less than eight months of service, in addition to having presumably been granted an equity stake in the post-merger company promptly after the Acquisition. The outsized single-trigger payments incentivized Anicetti to push for a quick sale at an inopportune time, and the Board could not have agreed to the enormous single-trigger payments in good faith if Ray Berry had been candid with his fellow directors that he was working on a plan to take Fresh Market private at

the time Anicetti was hired. Thus, each of the Director Defendants was conflicted and serving his own financial interests rather than those of Fresh Market's other stockholders.

178. Ackerman, received nearly $2 million for his accelerated options and equity awards and over $3.6 million in change-of-control benefits (nearly $2 million of which were "single-trigger" payments), as well as presumably receiving an equity stake in the post-merger company. Those payments dwarfed his less than $100,000 worth of common stock. Thus, Ackerman had a strong incentive to lowball the financial projections that would be used to justify the Acquisition.

The Unfair Price

179. The price at which the Board agreed to sell the Company is unfair to its stockholders. Fresh Market stock was trading at as high as $41.12 per share in January 2015 before Ray Berry took advantage of an opportunity to buy the Company on the cheap. The inadequacy of the $28.50 per share Acquisition price is also readily apparent from J.P. Morgan's discounted cash flow analyses of management's November 17, 2015 projections.

180. As explained above, J.P. Morgan's original discounted cash flow analysis based on management's November 17, 2015 projections valued the Company at between $34.50 and $44.00 per share. That is, J.P. Morgan's own analysis shows that the Company was worth between 21% and 54% more than the Acquisition price.

181. Even J.P. Morgan's final analysis in March, which used a discount rate that it had inappropriately increased for reasons that were not honestly explained to the Board, valued the Company at $33.75 to $42.25 per share.

182. Those two discounted cash flow analyses undervalued the Company because, among other flaws, they used an implied EBITDA multiple in the final year of the analysis of less than 5x. By contrast, J.P. Morgan used a much higher EBITDA multiple range of 7x-9x in its Selected Transaction analysis.

183. Moreover, as explained above, and unbeknownst to the stockholders, the November 17 Management Case already reflected any risks inherent in the Company's strategic plan as it incorporated a 15% risk adjustment. Accordingly, the analysis based on that forecast was already plenty conservative enough to provide a reliable indication of the Company's value – if not unduly conservative, given management's personal incentives to err on the side of pessimism.

Preclusive Deal Protection Devices

184. To ensure that Apollo, and only Apollo, acquired Fresh Market, defendants included several deal protection devices in the merger agreement. While the merger agreement permitted Fresh Market to shop itself until April 1, 2015, that illusory 21-day "go-shop" period provision appeared meaningless in light of the deal protection devices in the merger agreement and the reality (which was obvious to any interested party) that the Berry family, and the substantial portion of Fresh

Market's equity that they owned, were committed to Apollo and the Acquisition. Not surprisingly, no alternate bidders stepped forward during the go-shop period.

185. The deal protection devices in the merger agreement precluded a fair sales process for the Company and locked out competing bidders, and include: (a) a no-shop clause that precluded the Company from soliciting potential competing bidders after the go-shop period ended; (b) a matching rights provision that would require the Company to disclose confidential information about competing bids to Apollo and allow Apollo to match any competing proposal; (c) a termination and expense fee provision that would have required the Company to pay Apollo $34 million if the Acquisition was terminated in favor of a superior proposal; and (d) a tender-offer transaction structure that minimized the amount of time the Acquisition was pending and thus made it much more difficult for any other party to come forward with a competing offer. These provisions substantially and improperly limited the Board's ability to act with respect to investigating and pursuing superior proposals and alternatives, including a sale of all or part of Fresh Market.

186. The tender offer structure and the onerous and preclusive deal protection devices operated conjunctively to make the Acquisition a *fait accompli* and ensured that no competing offers emerged for the Company. Viewed together, the deal protection provisions in the merger agreement, discussed above, effectively precluded any other potential bidders from consummating an offer for the Company

and made even more egregious the Board's utter failure to obtain the best price possible for stockholders before agreeing to the Acquisition.

Cravath and Duggan Draft a False and Misleading 14D-9 to Procure Stockholder Approval and Cover Up Prior Wrongdoing

187. The Delaware Supreme Court has already spoken about the 14D-9 fails to disclose "troubling facts regarding director behavior." Duggan and Cravath are responsible for drafting the 14D-9, as indicated on its face. Duggan falsely attested that the 14D-9 was "true, complete and correct." Ray Berry and the Director Defendants also bear legal responsibility for its contents. JP Morgan and Apollo knowingly participated in crafting the false and misleading 14D-9.

188. As discussed by the Delaware Supreme Court, the 14D-9 omitted facts that "would have shed light on the depth of the Berrys' commitment to Apollo, the extent of Ray Berry's and Apollo's pressure on the Board, and the degree that this influence may have impacted the structure of [the] sale process."

189. The Delaware Supreme Court observed that the 14D-9 "never mentions [Ray Berry's] response to a question from the Company's outside counsel, Cravath, Swaine & Moore LLP," at the October 15 board meeting, namely that "he was not aware of any other potential private equity buyer that had experience in the food retail industry with whom he would be comfortable engaging in an equity rollover."

190. The Delaware Supreme Court analyzed at length how the 14D-9 does not disclose critical contents of the "crucial e-mail" from Ray Berry's counsel to Cravath's Damien Zoubek, dated November 28, 2015.

191. The Delaware Supreme Court also discussed how the 14D-9 mischaracterize the minutes of the October 15 board meeting respecting how "the Company had *already* become subject to stockholder pressure" and "the Board considered that fact when deciding to form the [Strategic Transaction] Committee."

192. To summarize, the Delaware Supreme Court concluded that Plaintiff sufficiently alleged material omissions respecting:

- "serious misrepresentations … about Ray Berry's 'agreement' with Apollo";
- "Ray Berry's clear preference for Apollo and willingness to consider an equity rollover";
- "Ray Berry's 'threat' to sell his shares"; and
- "the depth and breadth of the pressure confronting the Company".

193. ***Additionally, the 14D-9 omitted that the November 17 Management Case reflected a 15% risk discount***. The management projections presented at the Board's December 1 and 2, 2015 meeting, referred to in the 14D-9 as the "November 17 Management Case," reflected a "15% overall risk adjustment, with different initiatives receiving different risk weighting based on likelihood of achievability." The 14D-9, however, makes no mention of the risk adjustment built into the

November 17 Management Case, thus misleading stockholders into believing that the various downside scenarios created by management and JP Morgan, as it became clear that they were the only way to make Apollo's bid look fair, were appropriate and reasonable ways to sensitize optimistic projections to the possibility that they might not be achieved.

194. ***The 14D-9 omitted that the sensitivities J.P. Morgan ran in December 2015 on the November 17 Management Case included upside as well as downside sensitivities***. The 14D-9 falsely and misleadingly states that on December 1, 2015, management and J.P. Morgan reviewed for the Board "sensitivities . . . in the event that revenue or gross margin fell short of what was reflected in the November 17 Management Case." In fact, the revenue growth and EBITDA margin sensitivities reviewed at that Board meeting ranged from -3% to +1%.

195. ***The 14D-9 falsely stated management prepared the additional downside scenarios and misleadingly omitted the timing and circumstances of their creation by JP Morgan.*** The 14D-9 falsely states "TFM's management prepared the Additional Scenario Information." The 14D-9 misleadingly omits that the additional downside scenarios were created by JP Morgan after the Company received Apollo's offer on March 8, 2016.

196. The 14D-9's misleading presentation of the additional scenarios was no accident. Cravath and JP Morgan extensively discussed how to craft disclosure of the December sensitivities and the last-minute additional scenarios.

CLASS ACTION ALLEGATIONS

197. Plaintiff brings this action individually and on behalf of a class of all former public stockholders of Fresh Market (the "Class"). Excluded from the Class are defendants and any directors or officers of Fresh Market, as well as the members of their immediate families, and any entity in which any of them has a controlling interest, and the legal representatives, heirs, successors, or assigns of any such excluded party.

198. The members of the Class are so numerous that joinder of all members is impracticable.

199. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and all members of the Class are being injured or legally damaged as a result of defendants' wrongful conduct. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action and securities litigation.

200. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by members of the Class may be relatively small, albeit significant, the expense and burden of individual litigation makes it virtually impossible for plaintiff and members of the Class individually to seek redress for the conduct alleged. Plaintiff knows of no difficulty to be encountered in the management of this action which would preclude its maintenance as a class action. Relief concerning plaintiff's rights

under the laws involved herein and with respect to the Class as a whole would be appropriate.

201. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are whether all or any subset of the director and officer defendants breached their fiduciary duties to the Class, whether all or any subset of the other defendants aided and abetted that breach of fiduciary duties and whether and to what extent members of the Class suffered damages on account of that breach of fiduciary duties and aiding and abetting thereof.

COUNT I

Breach of Fiduciary Duty
(Against the Director Defendants)

202. Plaintiff repeats and realleges each allegation set forth herein.

203. The Director Defendants, acting as directors, have knowingly or recklessly and in bad faith violated their fiduciary duties of loyalty, candor, good faith, and independence owed to the public stockholders of Fresh Market and have acted to put their personal interests ahead of the interests of Fresh Market's stockholders.

204. By the acts, transactions, and courses of conduct alleged herein, the Director Defendants, individually and acting as a part of a common plan, knowingly

or recklessly and in bad faith unfairly deprived plaintiff and the other members of the Class of the true value of their investment in Fresh Market.

205. The Director Defendants have knowingly or recklessly and in bad faith violated their fiduciary duties by entering into the Acquisition without regard to the fairness of the transaction to Fresh Market's stockholders and by concealing from the stockholders several material facts for disloyal reasons.

206. As demonstrated by the allegations above, the Director Defendants knowingly or recklessly and in bad faith failed to exercise the care required and breached their duties of loyalty, good faith, candor, and independence owed to the stockholders of Fresh Market because, among other reasons, they failed to ensure a fair process and maximization of stockholder value.

207. Because the Director Defendants dominate and control the business and corporate affairs of Fresh Market and are in possession of private corporate information concerning Fresh Market's assets, business, and future prospects, there exists an imbalance and disparity of knowledge and economic power between them and the public stockholders of Fresh Market, which makes it inherently unfair for them to pursue any proposed transaction wherein they reap disproportionate benefits to the exclusion of maximizing stockholder value.

208. By reason of the foregoing acts, practices, and course of conduct, the Director Defendants knowingly or recklessly and in bad faith failed to exercise

ordinary care and diligence in the exercise of their fiduciary obligations toward plaintiff and the other members of the Class.

209. As a result of the actions of defendants, plaintiff and the Class have been harmed in an amount to be proven at trial.

COUNT II

Breach of Fiduciary Duty
(Against Defendants Richard A. Anicetti and Scott Duggan)

210. Plaintiff repeats and realleges each allegation set forth herein.

211. Defendants Anicetti and Duggan, acting as officers, have at least grossly negligently violated their fiduciary duties of care, loyalty, candor, good faith, and independence owed to the public stockholders of Fresh Market and have acted to put their personal interests ahead of the interests of Fresh Market's stockholders.

212. By the acts, transactions, and courses of conduct alleged herein, Anicetti and Duggan, individually and acting as a part of a common plan, at least grossly negligently unfairly deprived plaintiff and the other members of the Class of the true value of their investment in Fresh Market.

213. Anicetti and Duggan have at least grossly negligently violated their fiduciary duties by entering into the Acquisition without regard to the fairness of the transaction to Fresh Market's stockholders and by concealing from the stockholders several material facts for disloyal reasons.

214. As demonstrated by the allegations above, Anicetti and Duggan at least grossly negligently failed to exercise the care required and breached their duties of

care, loyalty, good faith, candor, and independence owed to the stockholders of Fresh Market because, among other reasons, they failed to ensure a fair process and maximization of stockholder value.

215. Because of Anicetti's and Duggan's positions as officers, there exists an imbalance and disparity of knowledge and economic power between them and the public stockholders of Fresh Market, which makes it inherently unfair for them to pursue any proposed transaction wherein they reap disproportionate benefits to the exclusion of maximizing stockholder value.

216. By reason of the foregoing acts, practices, and course of conduct, Anicetti and Duggan at least grossly negligently failed to exercise ordinary care and diligence in the exercise of their fiduciary obligations toward plaintiff and the other members of the Class.

217. As a result of the actions of defendants, plaintiff and the Class have been harmed in an amount to be proven at trial.

COUNT III

Aiding and Abetting Breach of Fiduciary Duty
(Against Defendants Brett Berry, Cravath, JP Morgan, and Apollo)

218. Plaintiff repeats and realleges each allegation set forth herein.

219. Brett Berry, Cravath, JP Morgan, and Apollo have knowingly participated in the foregoing breaches of fiduciary duty.

220. Brett Berry was a party to the understanding that he and his father, Ray Berry, would work with Apollo to take the Company private by rolling over their

equity in the Acquisition; then acted as Ray Berry's proxy in discussions with Apollo as part of a deliberate effort to conceal the Berrys' involvement in the Acquisition from the Board and then from Fresh Market's stockholders; and then knowingly allowed the Director Defendants to proceed with a purported sales process that would lead inevitably to Apollo's acquiring the Company and the Berry family's participation in the substantial future profits that will be earned under Apollo's ownership. Brett Berry knowingly participated with Ray Berry and Apollo in multiple breaches of Apollo's confidentiality agreement with the Company. In addition, Brett Berry knew the 14D-9 was misleading and incomplete in material respects but did nothing to rectify the misstatements and omissions contained in that disclosure document.

221. Cravath knowingly participated with Duggan and the Director Defendants in misleading first the Board and then Fresh Market stockholders about Ray Berry's interactions with and commitment to Apollo, and in causing the creation of fabricated "sensitivities" to management's projections for the purpose of justifying the inadequate Acquisition price.

222. JP Morgan knowingly participated with Ray Berry in helping him and Apollo acquire the Company at an unfair price, for example by tipping Apollo as to the lack of competition such that Apollo could lower its offer below the price it was previously willing to pay, and knowingly participated with Duggan, Anicetti, and the Director Defendants in misleading stockholders by fabricating so-called

“sensitivity” adjustments to the management projections for the purpose of justifying the Acquisition price.

223. Apollo knowingly participated with Ray Berry in acquiring the Company at an unfair price, exploiting Ray Berry’s conflict of interest to take the Company private at an inappropriate time and an inappropriate price, exploiting Ray Berry’s and Duggan’s dishonesty with the Board to participate in a sham sale process that it was preordained to win at an inadequate price, exploiting the Director Defendants’ (at least) grossly negligent oversight of the sale process, and exploiting the Director Defendants’ decision to retain a conflicted financial advisor in JP Morgan, using that conflict to obtain crucial inside information that allowed Apollo to acquire the Company even more cheaply than it otherwise would have.

224. As a result of defendants’ actions, plaintiff and the Class have been harmed in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, on plaintiff's own behalf and on behalf of the Class, prays for judgment as follows:

A. Declaring this action to be a class action under Court of Chancery Rule 23(a) and (b)(3) on behalf of the Class defined herein;

B. Declaring that the Director Defendants, Anicetti as an officer, and Duggan breached their fiduciary duties and that Brett Berry, Cravath, JP Morgan, and Apollo aided and abetted those breaches of fiduciary duty;

C. Awarding plaintiff and the other members of the Class rescissory damages in an amount which may be proven at trial, together with interest thereon;

D. Awarding plaintiff and the members of the Class compensatory damages in an amount which may be proven at trial, together with interest thereon;

E. Awarding plaintiff and the members of the Class pre-judgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs; and

F. Awarding such other and further relief as this Court may deem just and proper, including any extraordinary equitable relief as permitted by law or equity to attach, impound, or otherwise restrict defendants' assets to assure plaintiff has an effective remedy.

FRIEDLANDER & GORRIS, P.A.

/s/ *Joel Friedlander*

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DATED: March 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, I caused a copy of the **Public Version of the Verified Amended Complaint** to be served upon the following counsel by File & Serve*Xpress*:

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